(Quotes from Book:)

Administrative Justice & the Supremacy of Law
in the United States
By John Dickenson

Dedicated to Dean Roscoe Pound & Professor Felix Frankfurter
Studies from Princeton, Johns Hopkins, Columbia & Harvard Universities.

(Introductory Quotations:)

"He who bids the law rule, bids God and Reason Rule, but he who bids man rule adds an element of the beast, and passion perverts rulers, tho they be the best of men. Therefore Law is Reason free from (passion) desire." Aristotle, *Politics, 3; 16*; 4, 5,

"Law is in all cases Universal." Aristotle, *Nicomachean Ethics, 5; 10*; 4, 6.

"Law ought to be supreme over all". Aristotle, *Politics, 4 (6)*, 4, 31

"Government, to define it de jure, or according to ancient prudence, is an art whereby a civil society of men is instituted and preserved upon the foundation of common or right interest; or, to follow Aristotle and Livy, it is the empire of laws and not of men." James Harrington, *Oceania*, in *Works*, ed. 1737, p.37

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Chapter 1, Page 3:

The multiplication in recent years of public bodies like public service commissions and industrial accident boards, accompanied by vesting of ampler powers in health officers, building inspectors, and the like, has raised anew for our law, after three centuries, the problem of executive justice. **That government officials should assume the traditional function of courts of law, and be permitted to determine the rights of individuals, is a development so out of line with the supposed path of our legal growth as to challenge renewed attention to certain underlying principles of our jurisprudence. ...**

In the age of Coke such questions as these arose in connection with what has since been called **"executive justice."** To-day the term "executive" seems fitted to a narrower need, and "administrative justice" suggests itself a better name for the broader current legal development.

Chapter 2, Page 32:

The introduction of administrative justice has encountered in our constitutional doctrine of the "separation of powers" a barrier which has been evaded only by the invention of a new set of glaring legal fictions embodied in such words as "quasi-legislative," "quasi-judicial," and the like. To review the development of these fictions would supply an instructive commentary on an important branch of American constitutional law, but it would not shed helpful light on the more fundamental problems presented by the substitution of administrative justice for adjudication by courts of law. These problems reach below the special limitations of American constitutional law and turn up for inspection some of the deepest principles of the Anglo-American legal system.

In Anglo-American jurisprudence, government and the law have always in a sense stood opposed to each other; the law has been rather something to give the citizen a check on the government than an instrument to give the government control over citizens. There is a famous phrase, which has long been attributed to Bracton, ... that "the king has a superior, to whit, the law; and if he be without a bridle, a bridle ought to be put on him, namely, the law." This "rule of law" as Dicey calls it, or "supremacy of law," in Libeler's

phrase, has uniformly been treated as the central and most characteristic feature of Anglo-American juristic habit; and nothing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the common law. That government officials, on the contrary, should themselves assume to preform the functions of a law court and determine the rights of individuals, as is the case under a system of administrative justice, has been traditionally felt to be inconsistent with the supremacy of law. It was the ground of attack on the Court of Star Chamber, in the days when the Chancellor was still mainly an administrative officer of the King. Lieber mentions freedom from "government by commissions," and from the jurisdiction of executive courts, as one of the elements of Anglo-American Liberty.

Pages: 34, 35, 36, 37, & 38.

The orthodox doctrine of the supremacy of law has been stated by Dicey as including two principles: "It means in the first place that no man can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land." It mans in the second place "that no man is above the law, but that every man, whatever his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals . . . With us, every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."

(Law of the Constitution, 8th edition., p.185 & 189)

"In short, every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and, secondly, to call into question in such a court the legality of any act done by an administrative official." ...

"The substantive difference between administrative procedure and the procedure by law is that the administrative tribunals decide controversies coming before them, not by fixed rules of law, but by the application of governmental discretion or policy.

It is this last point which is of capital interest here. The competition between administrative & legal justice, is ... a phase of the age-old struggle between discretion and fixed rule, between *vouops* and *ekleiakela,* between equity and the strict law."

In so far as administrative adjudication is coming in certain fields to take the place of adjudication by law courts, the supremacy of law as formulated in Dicey's first proposition is overridden. But a possible way of escaping this result is left open by his second proposition. An administrative determination is an act of a governmental officer or officers; and if it be true that all the acts of such officers are subject to be questioned in the courts, it is then possible to have the issue of any questionable administrative adjudication raised and decided anew in a law court, with the special advantages guarantees of the procedure at law. We see here the reason why the question of court review of administrative determinations has become of such central importance and has been the focus of so much discussion since the rise of the administrative procedure. For just so far as administrative determinations are subject to court review, a means exists for maintaining the supremacy of law, though at one remove and as a sort of secondary line of defense. The special advantages of the administrative procedure may be substantially retained, while at the same time, in a given case, the result can be brought to the test of the procedure at law. Administrative justice exists in defiance of the supremacy of law only in so far as administrative adjudications are final and conclusive, and not subject to correction by a law court.

Pages: 84, 85, 86, 87, 88:

To the Middle Ages and the men who were the heirs of the Middle Ages, law was not the will of the state expressed through government, for what government there was, was not properly an organ of the state, as we conceive it, at all; law was a transcendental force, "the breath of God, the harmony of the world,"(fn23) clothed with an inherent and independent authority, and ruling the sovereign from above & without, as the sovereign in his own turn ruled from above and without the individuals and groups who were his subjects. This was the idea which had been used as a weapon against kings in the Middle Ages; one of the counts in the indictment against Richard II was that he had enforced enactments which were erroneous and repugnant to the law and to reason. (fn24) And this was the idea for which Coke did battle against James.

What was the nature and content of this law, which was not the creature of government but was above government? The idea, as a practical force appears to have had a Teutonic and not Roman origin. The Romans made much, of course, of natural law; but at the time of the invasions they had come to recognize positive law as deriving its authority from the will of the emperor - that is, as we should say, from the government. The Germanic conception of positive law, on the other hand, was the product of less sophisticated institutions. The law that they knew was custom - the immemorial usages which had crystalized within the tribe and were pronounced from time to time in the solemn dooms of the elders. "It was part of the national or tribal life; it had grown with the tribe, changing, no doubt, but the people or the tribe were hardly conscious of the changes." "To them the law was not something made or created at all ... legislative acts were not expressions of will, but records or promulgations of that which was recognized as already binding upon men." Law was thus naturally conceived as a permanent thing, something always existing and to be found by the elders in council, announced by them but not made. (fn27)

In fact, the greatest possible violation of law was to change it. Hence the clamor against progressive kings raised throughout the Middle Ages by people, demanding back their "good old laws"; every reform had to be distinguished under the appearance of a restoration of long lost legal rights. Gradually from Roman courses filtered in the idea of a law of nature, in England spoken of as simply a law of reason, (fn29) which becomes confused in no clearly understood way with the customary law of the land; so that "to discern the law of reason from the positive law is very hard," as we read in "Doctor and Student." Forescure, whom Coke follows in the main on this point, says that the laws of England are natural, customary, and statute; "the two former when they are reduced into writing and made public by a sufficient authority of the prince and commanded to be observed, they then pass into the nature of statutes." (Fn31) In short, a statute does not make new law; it promulgates, and gives greater emphasis and clarity to, what had always been law before. (Fn-32)

It is the peculiar relation which subsisted in England between "natural law" or the "law of reason," on the one hand, and the customary law of the land on the other, that lends the English common law its distinctive flavor. Common law was essentially custom, but it was also something more: it consisted of customs which were regarded as reasonable, or at least not unreasonable. The common law thus conceived was fused of two elements and presenting two aspects: (1) it was the law of the land, that is a body of traditional custom; (2) it was the "perfection of reason." So artificial was the manner in which these two elements united to form it, that it was a science and "mystery" in the mediaeval sense, to be known only after hard discipline & study. (fn33) On the other hand, such was the intrinsic and independent authority of the elements themselves, natural reason and immemorial tradition, that the common law, so intimately compounded of both, was well qualified from the standpoint of the times to occupy in mens minds a position more venerable than even the sovereign power of a monarch. The place

which common law, so conceived, held in the thought of Englishmen at the beginning of the Tudor period has been vividly described by Father Figgs:

"The Common Law, though containing much that may originally have been directly enacted, yet possessed that mysterious sanctity of prescription which no legislator can bestow. The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do no more than declare the Common Law. It is the Common law which men set up as the object of worship. They regard it as the symbol of ordered life and disciplined activities, which are to replace the license and violence of the evil times now passed away. ... Instead of the caprice of the moment or the changing principles of competing dynastic policies, or the pleasure of some great noble, or the cunning of a usurper, there shall be in England as system, older than Kings and Parliament, of immemorial majesty and almost divine authority. ... The Common Law is the perfect ideal of law; for it is natural reason, developed and expounded by collective wisdom of many generations. By it kings reign and princes decree judgement. By it are fixed the relations of the estates of the realm and the fundamental laws of the constitution. Based on long usage and almost supernatural wisdom, its authority is above, rather than below, that of the Acts of Parliament or Royal ordinances, which owe their fleeting existence to the caprice of the King or the pleasure of councillors, which have a merely material sanction and may be repealed at any moment." (fn34)

Such an entity was fitted to fill that position of transcendent and inherent authority which Coke was to give to his controversy with James.

Page 90 & 91:

Driven forward by the logic of his position, Coke finally claimed for the judges the power, not merely to interpret, but in effect to set aside statute. This was in the well known case of Dr Bonham, a case which belongs in the family tree of administrative law cases.
(Coke argues for a complex interpretation of statute because) the other and obviously sounder interpretation would make the College Authorities at once judges and parties in the same cause. Such result would be contrary to the common law; and then follows the famous sentence: "and it appears from our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such act to be void."

Pages: 96, 97:

"Jefferson indicates his belief that common law was a survival of lost enactments of the Saxon period: 'The authentic text of these enactments has not been preserved; but their substance has been committed to many ancient books ans writings, so faithfully as to have been deemed genuine from generation to generation.' The other branch of **Wilmont's doctrine, vis., that common law was natural justice, was adopted by Alexander Hamilton in his argument in People v. Croswell, 3 Johns, Cas. App. 344: "The common law is natural law & natural reason applied to the state & condition of society."** (Works, ed. Lodge, viii, 421.)

Footnotes:
23: Hooker, *Ecclesiastical Polity*, Book 1, ch. xvi; or Mr Justice Holmes has phrased it, a

brooding in the sky," Southern Pacific Co. v. Jensen, 244 U.S. 205 at p 222.
24: McIlwain, *High Court of Parliament*, p. 69. "The conflict between law and prerogative constitutes a large part of English constitutional history," G. B. Adams, *Constitutional History of England*, p. 79.
26: Carlyle, *op.ci*., iii, 41. "It is difficult to appreciate that among all peoples in their earlier periods of political development the state was regarded as almost exclusively an organ for the execution of the law, not for its creation," W. W. Willoughby, *Political Theories of the Ancient World*, p. 64.
27: Discovery of the Theory of Law. This notion of law as something not made, but existing and to be found, was common to European peoples so long as their institutions remained fairly primitive. Thus it forms a part of the well-known definition of law attributed to Demosthens: Every law is a discovery, a gift from the Gods, a precept to wise men, a righting of intentional and unintentional wrongs, **a compact between all the members of the state, in accordance with which all who are within the state should live,"** First Speech against Aristogeiton, 774. For a very early expression of the view that law is a "discovery," coupled oddly with an anticipation of the doctrine of legislative sovereignty, see Herodotus, III, 31: (Latin) ... For a very late view, see Calvin Coolidge, *Have Faith in Massachusetts*, p.4 "Men do not make laws. They do but discover them. ... That state is most fortunate in its form of government which has the aptest instruments for the discovery of laws." For an intermediate view, which dominated the thought of the middle ages, and which identified the "immutable law" with the "law of god," see St Augistine, *De Vera Religione*, c. 31: (Latin) ...
34: *Divine Right of Kings*, 1st ed., pp.226-228.